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COURT OF APPEAL, FOURTH APPELLATE DISTRICT

DIVISION ONE

STATE OF CALIFORNIA

In re NICHOLAS P., a Person Coming
Under the Juvenile Court Law.

KARIN W. et al,

Petitioners and Respondents,

v.

FREDERICK P.,

Objector and Appellant.

D038139

(Super. Ct. No. A47353)

APPEAL from a judgment of the Superior Court of San Diego County, Richard D. Huffman, Judge. (Associate Justice of the Court of Appeal, Fourth Appellate District, assigned by the Chief Justice pursuant to article VI, section 6 of the California Constitution.) Affirmed.

Frederick P. appeals a judgment terminating his parental rights to his son, Nicholas P. He contends the court erred in terminating his rights under Family Code

section 7825¹ and asserts the court erred in admitting a report and recommendation by the San Diego County Health and Human Services Agency (Agency). We affirm the judgment.

FACTUAL AND PROCEDURAL BACKGROUND

Karin and Frederick were married in October 1991, and Nicholas was born in June 1992. Karin and Frederick separated in March 1993, and a judgment of dissolution was granted in April 1995. Karin married Beat W. in July 2000.

The judgment of dissolution granted Karin custody of Nicholas with visitation between Frederick and Nicholas as agreed by the parents. When Nicholas was two and one half years old Frederick saw him for the first time since the separation. Karin and Frederick agreed to a visitation plan with monitored exchanges that was in place from October 1996 until the visits were terminated in February 1997 because of Frederick's drug abuse problems and because he did not comply with rules governing visitation.

Before Frederick's marriage to Karin, he battered his first wife and violated restraining orders that prevented him from contacting her. He also assaulted an employee. In 1994, he was declared a vexatious litigant because of frivolous lawsuits he filed against Karin. Between 1993 and 1995 he was convicted of driving while intoxicated three times and each time placed on probation. In 1995 his threats to a judge in his bankruptcy case resulted in an FBI investigation.

¹ All statutory references are to the Family Code.

After they separated, Karin obtained a restraining order against Frederick. She took out a second restraining order in September 1997 that prohibited him from contacting her or Nicholas. She obtained a third restraining order in April 2000.

In September 1997, Frederick was arrested for stalking and threatening Karin and tampering with a vehicle. He pled guilty to the stalking and threatening charges and was sentenced to the four-year upper term. He was released on March 20, 2000, with parole conditions that included drug and alcohol testing, outpatient treatment, attending an anger management and domestic violence class and having no contact with Karin or Nicholas.

In August 2000 Frederick filed an order to show cause to establish visitation with Nicholas. Karin and Beat then petitioned to terminate his parental rights and to allow Beat to adopt Nicholas. They alleged Frederick was an unfit parent under section 7825 because of his conviction of stalking Karin in violation of a restraining order, his criminal history and his vows to continue to harass Karin. They also claimed he abandoned Nicholas within the meaning of section 7822 because he had not provided support nor contacted him.

Frederick denied being convicted of violating the restraining order because it was not served until after his arrest. He denied harassing Karin, arguing he had not personally contacted her in 1995, 1996 or 1997. He also claimed he paid child support through his mother and through a bankruptcy court settlement.

Agency filed a report and recommendation. It detailed Frederick's three years of harassing Karin and his criminal conviction. It included Karen's report of the domestic violence and harassment Frederick inflicted on her and Nicholas's statement that he wants

to be adopted by Beat and does not remember much about Frederick. The report also included Frederick's denials he ever physically abused Karin and his statement he has been rehabilitated during his prison term by completing anger management classes, undergoing therapy and participating in AA meetings. Agency opined Frederick does not recognize his own fault in not being allowed to contact Nicholas and his obsessive focus on tormenting Karin shows his complete disregard for Nicholas's welfare. Agency recommended declaring Nicholas free from Frederick's custody and control. The court admitted Agency's report over Frederick's objection.

At the hearing, Karin testified about Frederick's physical and verbal abuse. She said he paid support of about \$15,000 immediately after their separation and made some house payments and paid household expenses but provided no other support. She testified he violated the first restraining order and continued to harass her by telephone. She said after the divorce Frederick and Nicholas had sporadic visits, which she ended because of Frederick's verbal abuse, and they then agreed to monitored exchanges, an arrangement that lasted four months. Karin testified money Frederick's mother gave her was not for support from Frederick, but it was to allow Nicholas to have his own room and for a Christmas gift.

Frederick's friend, Mark Mendoza, opined, based on his observation of one meeting, that Frederick and Nicholas had a happy relationship. Another friend, James Warner, testified Frederick was out of control when he was using drugs, but had now changed. W. D. House, who worked with Frederick during and after his incarceration,

testified he first thought Frederick was a disturbed person, but had seen his rehabilitation and said he did not now pose a danger to Nicholas.

Frederick testified about paying Karen's bills in 1993 and said in 1996 and 1997 his mother had contributed support on his behalf, plus he had made an additional payment. He admitted he once had a significant drug problem but said he had been sober for almost four years. He expressed his remorse for his past behavior and stressed that he did not want to lose Nicholas.

The court recognized Frederick was doing much better than when he had a drug problem and had worked on rehabilitation while in prison, but found he was still not taking responsibility for his actions and was placing the blame on others. The court found it was in Nicholas's best interests to be adopted and that he wants to be adopted by Beat and does not wish to continue a parental relationship with Frederick. The court did not find Frederick had demonstrated an intent to abandon Nicholas under section 7822,² but it found that he had been convicted of a serious crime and, although he had undergone significant rehabilitation for his drug problem, his subsequent behavior and attitude showed he was unfit under section 7825 to have future custody and control of Nicholas. The court terminated Frederick's parental rights and freed Nicholas from his custody and control.

² The court found Frederick paid support in 1993 and 1995, but the payments from his mother were not child support.

DISCUSSION

I

Frederick contends the court erred in terminating his parental rights under section 7825. He argues Karin presented no evidence he was unfit to parent, she did not rebut evidence of his rehabilitation, and she presented no evidence that termination of his parental rights was in Nicholas's best interests.

The severance of parental rights is a drastic action that is only resorted to in extreme cases. (*In re Terry E.* (1986) 180 Cal.App.3d 932, 949.) However, ". . . while parenting is a fundamental right [citation], the decision to free a child from custody and control of the parent rests within the sound discretion of the trial court. . . ." (*In re Arthur C.* (1985) 176 Cal.App.3d 442, 446, quoting *In re Geoffrey G.* (1979) 98 Cal.App.3d 412, 421.) The court's decision must be affirmed if it is supported by substantial evidence "such that a reasonable trier of fact could find that termination of parental rights is appropriate based on clear and convincing evidence." (*In re Terry E., supra*, 180 Cal.App.3d at p.949.)

Section 7825 provides that an action to free a child from parental custody and control to allow the child to be adopted may be brought when both of the following requirements are satisfied:

"(1) The child is one whose parent or parents are convicted of a felony.

'(2) The facts of the crime of which the parent or parents were convicted are of such a nature so as to prove the unfitness of the parent or parents to have the future custody and control of the child."

"The purpose of the statute is to *prevent* future harm." (*In re Arthur C.*, *supra*, 176 Cal.App.3d at p. 445.) "[T]he welfare of the child[, however,] is not the sole determining factor; the statute requires clear and convincing proof of the parent's unfitness to have the future custody and control of the child." (*In re Terry E.*, *supra*, 180 Cal.App.3d at p. 953.) Prison incarceration by itself does not show a parent is unfit. "The petitioner must prove by clear and convincing evidence that the parent has not or cannot be rehabilitated during incarceration so that when he or she is released from prison the parent would be unable to properly care for the child." (*Ibid.*)

Here, the court's findings are well supported. Substantial evidence was presented that Frederick was unfit to parent and not sufficiently rehabilitated to be able to care for Nicholas. His crimes were of such a nature as to show his unfitness. Frederick stalked and threatened Karin for three years. The sentencing judge in his criminal action sentenced him to the upper term, commenting that his crime demonstrated "lawless arrogance [and a] refusal to recognize the rights of other people and the dictates and requirements of society." The statement of aggravation submitted for the sentencing phase of the criminal case reported numerous separate instances of Frederick's harassment of Karin and threats to continue to harass her. The fact that the many venomous messages he left on Karin's answering machine could have been heard by Nicholas illustrates his inability to concern himself with Nicholas's welfare in his obsession with harassing Karin. Frederick's protestations that the stalking only amounted to telephone calls and he was reacting to her baiting him and then hanging up the telephone show he still refuses to accept full responsibility for his actions and continues

to blame others for his behavior. His defense that he never physically harmed Karin also shows his refusal to accept responsibility for his conduct and a tendency to rationalize and minimize his wrongdoings.

Frederick's and his witnesses' testimonies about his incarceration, drug testing, classes, therapy, and attendance at AA show he has made great strides. The court, however, was well within its discretion to find this evidence did not show sufficient rehabilitation. As long as the court does not act arbitrarily, it may reject the testimony of witnesses. (*Lubetzky v. Friedman* (1991) 228 Cal.App.3d 35, 40.) The court reasonably found Mr. Mendoza's knowledge about the case was almost non-existent, Mr. Warner's testimony only supported a finding that Frederick is doing better now that he was in the past, and Mr. House's testimony only showed Frederick had involved himself in rehabilitation efforts at the prison. It was also well within the court's discretion to discount Frederick's own testimony that he had been rehabilitated. In judging Frederick's unfitness as a parent, the court could consider his demeanor and his refusal to take full responsibility for his past actions and tendency to overstate his rehabilitation.

Frederick's reliance on *In re Terry E.*, *supra*, 180 Cal.App.3d 932 and *In re Christina P.* (1985) 175 Cal.App.3d 115 is misplaced. In *In re Terry E.*, the appellate court held no reasonable trier of fact could find that the conditions that existed at the time of a mother's crimes, when she had participated in sexual crimes with a codefendant on a single occasion, still existed at the time her parental rights were terminated, and the only evidence relating to her ability to care for her children was that she had been rehabilitated during her incarceration. (*In re Terry E.*, *supra*, 180 Cal.App.3d at p. 950.) Here, by

contrast, Frederick's own testimony showed he continued not to take full responsibility for his harassment and threats against Karin over a long period and thus was not sufficiently rehabilitated. We find no support for Frederick's position in *In re Christina P.*, *supra*, where the appellate court reversed on grounds that trial counsel's failure to have a court reporter present during the hearing to terminate parental rights deprived the parents of a potentially meritorious defense because the grounds on which the termination was based, including the father's criminal history, were not supported by substantial evidence. (*In re Christina P.*, *supra*, 175 Cal.App.3d at pp. 123, 137.)

The court properly took into account the nature of the felony and the current circumstances, finding the crime of which Frederick was convicted to be "horrendous[,] a relentless, dogged, merciless effort to traumatize, threaten, intimidate another person." The court found Frederick had come a long way toward overcoming his drug problems, but that he had not accepted full responsibility for his actions and was unfit to have future custody and control of Nicholas. Clear and convincing evidence supports these findings.

II

Frederick asserts the court erred in admitting Agency's report and recommendation. He argues no information was provided to show the investigator explained to Nicholas the nature of the proceedings or his right to be present at the hearing as required by section 7851.³

³ Section 7851, subdivision (b), requires the report to include the following, *inter alia*: "(1) A statement that the person making the report explained to the child the nature of the proceeding to end parental custody and control.

If an assessment report addresses the principal issues in the proceeding, any deficiencies go to the weight of the evidence. (*In re Crystal J.* (1993) 12 Cal.App.4th 407, 413.) They do not make it inadmissible. Here, the court found the report substantially complied with the statutory requirements. The investigator stated she interviewed eight-year-old Nicholas and he expressed his understanding of the proposed adoption as, "[a]doption is when my dad is officially my dad. . . . He adopts me, and it makes him my dad and now I'm officially his son." The investigator reported Nicholas wants to be adopted by Beat because, "[w]e've been together for five years, and I really like him and my mom likes him." The report went on to say that Nicholas said he refers to Frederick as "Fred" and had trouble remembering the last time he saw him. The court reasonably accepted the report as being in substantial compliance with the statutory requirements.

Moreover, Frederick's argument that without the report there would have been no evidence of his lack of sufficient rehabilitation is completely without merit. Other evidence, including Frederick's own testimony, supports the finding. The investigator who prepared the report testified at the hearing and was cross-examined. Frederick did not raise any issues during cross-examination regarding her discussions with Nicholas.

"(2) A statement of the child's feelings and thoughts concerning the pending proceeding.

"(3) A statement of the child's attitude towards the child's parent or parents and particularly whether or not the child would prefer living with his or her parent or parents.

"(4) A statement that the child was informed of the child's right to attend the hearing on the petition and the child's feeling concerning attending the hearing."

The court did not err in admitting the report, nor has Frederick demonstrated he was prejudiced by its admission.

DISPOSITION

The judgment is affirmed.

McCONNELL, J.

WE CONCUR:

KREMER, P. J.

BENKE, J.